A

NG CHEE WAN

lwn.

RANHILL BERSEKUTU SDN BHD & SATU LAGI

B

MAHKAMAH TINGGI MALAYA, KUALA LUMPUR
MOHD ZAWAWI SALLEH H
[SEMAKAN KEHAKIMAN NO: R2(4)-25-141-2009]
12 JUN 2011

C ***UNDANG-UNDANG BURUH:*** *Pekerjaan - Pampasan - Sama ada syarikat gagal membuktikan pembuangan kerja pemohon atas alasan atau sebab adil - Gaji kebelakangan - Sama ada pemohon berhak kepada pampasan sebagai ganti pengembalian kerja*

D Pemohon memohon suatu perintah *certiorari* untuk membatalkan sebahagian award Mahkamah Perusahaan, di mana pemohon tidak diberikan pampasan selain daripada gaji kebelakangan. Pemohon juga memohon suatu perintah *mandamus* untuk remedi yang wajar menurut undang-undang dalam bentuk pampasan kewangan. Pemohon menghujahkan bahawa sekiranya perintah pengembalian
E semula kerja tidak diawardkan, Mahkamah Perusahaan sepatutnya mengawardkan pampasan di bawah dua kepala iaitu, pampasan sebagai ganti pengembalian semula kerja dan gaji kebelakangan.

Diputuskan (membenarkan permohonan dengan kos):

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(1) Mahkamah Perusahaan telah khilaf apabila tidak mengawardkan pampasan selain daripada gaji kebelakangan kepada pemohon sebagai ganti pengembalian semula kerja. Rasionalnya adalah untuk memberi pampasan kepada pemohon bagi kehilangan
G pekerjaan dan juga sebagai mengiktiraf tahun-tahun di mana pemohon telah berkhidmat untuk majikan. Pemohon oleh demikian berhak untuk dibayar pampasan sebagai ganti pengambilan semula kerja selain daripada gaji kebelakangan *Nestle Storage* (*Sabah Sdn Bhd v. Terrance Tan Nyang Yin* diikuti.
H (perenggan 11 & 16)

[Kes dikembalikan ke Mahkamah Perusahaan untuk didengar oleh Pengerusi yang lain untuk menentukan amaun yang harus dibayar kepada pemohon]

I

Kes-kes yang dirujuk:

Chong Mee Hup Kee Sdn Bhd v. Mahkamah Perusahaan Malaysia & Anor [2009] 1 ILR 465 ***(dirujuk)***

Dr A Dutt v. Assunta Hospital [1981] 1 LNS 5 FC ***(dirujuk)***

Koperasi Serbaguna Sanya Bhd (Sabah) v. Dr James Alfred (Sabah) & Anor [2000] 3 CLJ 758 CA ***(dirujuk)***

Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh [1997] 2 CLJ 11 SC ***(dirujuk)***

Nestle Food Storage (Sabah) Sdn Bhd v. Terrence Tan Nyang Yin [2002] 1 ILR 280 ***(diikuti)***

Perundangan yang dirujuk:

Industrial Relations Act 1967, s. 30(5)

Sumber-sumber yang dirujuk:

The Law of Industrial Dispute, vol 2, edisi keempat, halaman 961

Bagi pihak pemohon - Ramdhari JBS; T/n P Kuppusamy & Co

Bagi pihak responden pertama - Lim Heng Seng (Dymphna Lanjuran & Mohd Sabry Mohd Kassim bersamanya); T/n Lee Hishammuddin Allen & Gledhill

Dilaporkan oleh S Barathi

PENGHAKIMAN

Mohd Zawawi Salleh H:

Pendahuluan

[1] Ini adalah permohonan oleh pemohon (Ng Chee Wan) untuk suatu perintah *certiorari* bagi membatalkan sebahagian dari Award No. 255 Tahun 2009 bertarikh 2 Mac 2009 yang dibuat dalam kes Mahkamah Perusahaan No. 21/4-1322/05 ("award yang dicabar").

[2] Bahagian award yang dicabar ialah seperti yang terdapat di halaman 34-35 seperti berikut:

> RBSB has failed to prove that the dismissal of the claimant was with just cause or excuse. The court did not order reinstatement. When the claimant testified in court on 28 December 2006, he was 58 years old. He has passed the age of 60 years.
>
> The last drawn salary of the claimant was RM21,705 per month *vide* CL-77. He was no longer entitled to a site allowance when he was posted back at the headquarters of RBSB. The court

A awarded compensation of RM21,705 per month for 24 months = RM520,900.00. The said sum shall be paid within one month from the date of the award.

[3] Pemohon juga memohon suatu perintah *mandamus* untuk:

B (a) diarahkan kepada Pendaftar Mahkamah Perusahaan menghendaki beliau menetapkan kes Mahkamah Perusahaan No. 21/4-1322/05 untuk perbicaraan semula di hadapan pengerusi yang lain hanya untuk menentukan remedi yang sewajarnya menurut undang-undang termasuk remedi
C pengambilan kerja balik pemohon dalam jawatannya sebagai Ketua Jabatan Mekanikal dan Elektrik ("Head of Mechanical and Electrical Department") atau mana-mana jawatan lain yang sama status dengannya;

D (b) suatu keputusan untuk menentukan relif yang patut diterima oleh pemohon dan/atau gaji kebelakangan diperintahkan kepada pemohon dari tarikh pembuangan kerjanya sehingga tarikh penyelesaian kes ini termasuk semua sumbangan statutori, kenaikan gaji tahunan, bonus;

E (c) suatu keputusan untuk menentukan relif yang patut diterima oleh pemohon dari aspek sumbangan statutori iaitu Wang Simpanan Pekerja-Pekerja ("Employees Provident Fund") atas jumlah gaji kebelakangan ("backwages") yang sepatutnya diawardkan kepada pemohon;
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(d) suatu keputusan untuk menentukan relif yang patut diterima oleh pemohon untuk tempoh perkhidmatannya ("Year of service") dengan responden pertama dari 1 Mei 1982 (tarikh permulaan pekerjaan) hingga 29 September 2004 (tarikh
G dibuang kerja);

(e) suatu keputusan untuk menentukan relif yang patut diterima oleh pemohon untuk cuti tahunan yang tidak digunakan ("Unutilised Annual Leave") sebanyak 22.7 hari;

H (g) sekiranya perlu, perintah-perintah dan arahan-arahan selanjutnya diberikan; dan

(h) kos dalam kausa.

I

[4] Responden pertama menentang permohonan ini, antara lain, atas alasan-alasan yang berikut: A

(a) mahkamah mempunyai budi bicara untuk membuat pampasan kewangan ("monetary compensation") sebagai ganti pengambilan semula kerja (lihat *Dr A Dutt v. Assunta Hospital* [1981] 1 LNS 5); B

(b) seksyen 30(5) Akta Perhubungan Perusahaan 1967 menghendaki Mahkamah Perusahaan "to act according to equity, good conscience and the substantial merits of the case"; dan C

(c) sama ada suatu perintah pengambilan semula kerja perlu dibuat atau tidak adalah bergantung kepada beberapa faktor yang perlu diberi pertimbangan sewajarnya. (lihat kes *Kumpulan Perangsang Selangor Bhd v. Zaid Mohd Noh* [1997] 2 CLJ 11). D

[5] Berdasarkan fakta dan keadaan yang wujud dalam kes ini, iaitu, pemohon telah mencapai umur 60 tahun pada masa yang relevan, oleh itu dihujahkan bahawa adalah tidak sesuai bagi Mahkamah Perusahaan memerintahkan responden pertama diambil semula bekerja. E

[6] Pemohon berhujah bahawa sekiranya perintah pengambilan semula kerja tidak diawardkan, Mahkamah Perusahaan sepatutnya mengawardkan pampasan di bawah dua kepala; iaitu: F

(a) pampasan sebagai ganti diambil semula kerja; dan

(b) gaji kebelakangan ("backwages").

[7] Bagi menyokong hujahan di atas, pemohon merujuk kepada the *Industrial Court Practice Note No. 1 of 1987* di mana kaedah pengiraan pampasan adalah seperti berikut: G

(a) mengarahkan pengambilan semula kerja;

(b) mengarahkan bayaran pampasan. H

[8] Dalam kes ini, pemohon telah berkhidmat selama 22 tahun. Justeru, apabila beliau telah dibuang kerja secara konstruktif, dihujahkan bahawa Mahkamah Perusahaan telah membuat award yang betul dengan mengarahkan gaji kebelakangan dibayar bagi tempoh maksimum 24 bulan. Walau bagaimanapun, Mahkamah Perusahaan telah khilaf apabila gagal mengawardkan pampasan sebagai ganti pengambilan semula kerja. Di samping gaji I

kebelakangan RM21,705 sebulan x 24 bulan = RM520,920, Mahkamah Perusahaan dihujahkan sepatutnya mengawardkan pampasan sebagai pengambilan semula kerja RM21,705 x 22 bulan = RM477,510.

[9] Mahkamah Perusahaan sepatutnya mengawardkan juga perkara-perkara berikut:

(a) cuti tahunan yang tidak digunakan selama 22.7 hari (*Practice Note 1 of 1987*, butir 4(e)).
Pengiraannya ialah RM21,705 gaji sebulan x 26 hari (RM835 gaji sehari x 22.7 hari cuti tahunan yang tidak digunakan) = RM18,950.

(b) Sumbangan KWSP sebanyak RM2,664 sebulan. (lihat eksh. MG-4 halaman 396, lampiran 3(b)).

[10] Rujukan dibuat kepada kes *Koperasi Serbaguna Sanya Bhd (Sabah) v. Dr James Alfred (Sabah) & Anor* [2000] 3 CLJ 758, di mana Mahkamah Rayuan menyatakan di halaman 766:

> ... In such a case, the Industrial Court may award monetary compensation. Such an award is usually in two parts: **First**, there is the usual award for the arrears of wages, or backwages, as it is sometimes called. It is to compensate the workman for the period that he has been unemployed because of the unjustified act of dismissal. **Second**, there is an award of compensation in lieu of reinstatement. (penekanan ditambah)

Keputusan Mahkamah

[11] Selepas mendengar hujahan-hujahan lisan, menimbangkan hujahan-hujahan bertulis dan meneliti kertas-kertas kausa yang difailkan di sini, mahkamah ini bersetuju dengan hujah pemohon bahawa Mahkamah Perusahaan telah khilaf apabila tidak mengawardkan pampasan selain daripada gaji kebelakangan (*backwages*) kepada pemohon sebagai ganti pengambilan semula bekerja. Rasionalnya ialah untuk memberi pampasan kepada pemohon bagi kehilangan pekerjaan dan sebagai mengiktiraf tahun-tahun di mana pemohon tersebut telah memberi perkhidmatan kepada majikannya.

[12] Mahkamah mendapati rasional ini telah dihuraikan secara kompreohensif di dalam kes *Nestle Food Storage (Sabah) Sdn Bhd v. Terrence Tan Nyang Yin* [2002] 1 ILR 280 apabila Pengerusi Mahkamah Perusahaan, Encik Lim Heng Seng (sebagaimana dia ketika itu), berkata:

Compensation *in lieu* of reinstatement:

Where the court does not reinstate the workman, the non-reinstated workman will be awarded compensation *in lieu* of reinstatement together with an award of backwages. These appears to be a general consensus on the measure of such an award and there is consistency in the practice of the court in fixing the sum of the monetary award at one month's wages for each year of service. This is in line with Practise Note No. 1 of 1987 which stipulates that compensation in lieu of reinstatement shall be one month's pay for each year of service. The said practice note, however, limits the same to a maximum of 24 months. In *International Planned Parenthood Federation v. Tuan Syed Adam Al Jafri* [1982] MLLR 116, the court held:

> In the determination of the amount of compensation to be awarded, the court shall act according to equity, good conscience and on substantial merits of the case. And the amount of compensation to be awarded must therefore be of necessity just and equitable. In its assessment of compensation in lieu of reinstatement, the court had consistently awarded compensation based on one month's wages for each completed year of service. This is now the established norm and there is no reason for me to deviate from it, for in my view it is just and equitable.

The award is **compensation for compensation *in lieu* of reinstatement is** for all **intents and purposes** an award for the **loss of his employment** following his dismissal without just cause or excuse and his **non-reinstatement due to various reasons** which make reinstatement inappropriate. This award is a distinct head from the award for backwages which is the principal element in the pecuniary loss of the workman. In *Koperasi Serbaguna Sanya Bhd (Sabah) v. Dr James Alfred (Sabah) & Anor* [2000] 3 CLJ 758, the Court of Appeal noted that there are many imponderables too numerous to mention which influence the making of this award. The court proceeded to state that they include such matters as stigma which an act of dismissal carries with it and the drawback of a workman having to start from a lower rung when he finds alternative employment. The first imponderable referred to by the Court of Appeal is clearly a non-pecuniary item of harm caused to an unjustly dismissed workman; the second is harm or loss which is analytically both pecuniary and non-pecuniary in nature.

The unjustly dismissed workman has lost his security of tenure, a valuable right. He has suffered personal and domestic trauma and anxieties as well as social discredit and stigma. His personal, domestic social and professional life would have suffered dislocation

A and professional life would have suffered dislocation and disruption in varying degrees. Where he is not reinstated he would have lost his seniority gained from his years of service. He would be put to the disadvantage of starting a new career path all over again in his new appointment. And if he were to start on a lower rung, apart from the social standing there might well be accompanying financial loss due to a lower starting pay and loss of other perquisites. Clearly then the award of compensation *in lieu* of reinstatement is intended to compensate the workmen for both the pecuniary and non-pecuniary harmful or injurious consequences arising from his unjust dismissal.

C The court's duty remains however and that is to determine what is a reasonable amount of compensation for his loss of employment arising out of his unjust dismissal and non-reinstatement. In one since, all unjustly dismissed workmen who are not reinstated to their employment suffer the same kind of D hardship and negative consequences and there ought accordingly to be one measure for all of them regardless of their station in live or their earnings. In another sense, it might well be contended that a workman's personal circumstances and the impact of an unjust dismissal differ and there ought to be reflected in the award E of compensation. The hardship befalling a workman who lives from hand to mouth can be argued to be more serious than that of a well-paid workman who has substantial savings and has carefully invested his surplus income. It might equally well be contended that a person holding a more senior position with a high social status and correspondingly high level of income will F suffer more grievously than a person holding a lower-ranking job when he loses his job and subsequently starts at a lower rung.

The **formula** hitherto applied by the court in keeping with Practice Note No. 1 of 1987 is the rate of one month's wages for each completed year service subject, however, to maximum of G 24 months. This basic approach has two features; the first is the principle that the measure of the award of compensation is based on the workman's income and years of service, the second is the fixing of maximum multiplier of 24. The Court sees sense, reason logic on the general approach.

H The second element in the formula is the imposition of a maximum multiplier of 24. It must be unarguable that whatever was the job a person was holding his length of service is a relevant factor in the assessment of compensation ...

I The award must be just and equitable. Compensation awarded should be of a reasonable quantum. It should not be excessive and save in carefully identified and circumscribed circumstances

where a punitive or exemplary purpose is called for, its principal object is compensatory. It should, however, not be so minimal as to be derisory and meaningless.

[13] Mahkamah ini bersetuju sepenuhnya dengan keputusan kes di atas dan menerima pakainya dalam kes ini. Nampaknya, bayaran pampasan sebagai ganti pengambilan semula kerja telah menjadi undang-undang yang mantap dan diaplikasikan oleh Mahkamah-Mahkamah Perusahaan dan disahkan oleh mahkamah atasan.

[14] Adalah perlu diambil perhatian bahawa dalam memberikan award untuk sesuatu kes, suatu pertimbangan yang wajar, adil dan saksama perlu dibuat antara kepentingan pihak-pihak yang terlibat. Malhotra dalam bukunya "*The Law of Industrial Dispute*", vol. 2, edisi keempat, menyatakan di halaman 961 seperti berikut:

In dealing with different types of cases, the tribunal in each case has to see that relief should be given in a *particular case to a particular workman* in the matter of compensation by *balancing the conflicting claims and the variations that exist in human conduct and the requirements of social justice*. On the parity of reasoning, the adjudicator has to counter-balance the claim of the employer that the workman was gainfully employed elsewhere during the period of unemployment with him, with the claim of the workman that he was not employed anywhere at all. The quantum of backwages is, therefore, a matter in the discretion of the tribunal dependent on the facts of a case. The tribunal will exercise its discretion keeping in view all the relevant circumstances. But the discretion must be exercised in a judicial and judicious manner.

... A workman directed under an award to be reinstated with backwages would not be entitled to backwages for the period during which he was usefully employed elsewhere, because he cannot be allowed to take double advantage and make excessive gains relying on the wrongful act of the employers. (penekanan ditambah)

[15] Dalam kes *Chong Mee Hup Kee Sdn Bhd v. Mahkamah Perusahaan Malaysia & Anor* [2009] 1 ILR 465, Mahkamah Tinggi menyatakan:

The assessment of monetary award or compensation *in lieu* of reinstatement is *a matter of discretion* for the Industrial Court which no doubt has to be *exercised reasonably in light of the particular facts, circumstances, substantial merits of the case and of course, in accordance*

A *with equity, substantive merits and good conscience without regard to technicalities and procedure*. (See s. 30(6) of the Industrial Relations Act 1967). At para 17).
(penekanan ditambah).

B **Kesimpulan**

[16] Mahkamah memutuskan bahawa pemohon adalah berhak untuk dibayar pampasan sebagai ganti pengambilan semula bekerja selain daripada gaji kebelakangan (*backwages*). Oleh itu, permohonan ini dibenarkan dengan kos yang ditetapkan sebanyak RM5,000.
C Mengenai isu apakah amaun yang perlu dibayar oleh responden pertama kepada pemohon sebagai ganti pengambilan semula kerja dan sama ada pemohon juga berhak kepada perkara-perkara lain seperti yang dinyatakan dalam permohonan, kes ini adalah dikembalikan kepada Mahkamah Perusahaan untuk didengar oleh
D seorang pengerusi yang lain bagi menentukan keseluruhan amaun yang harus dibayar oleh pemohon kepada responden pertama, dengan mengambil kira bahawa kuantum pampasan yang akan diberikan hendaklah adil dan munasabah dan tidak keterlaluan (*the quantum of compensation must be fair and moderate and not excessive*).
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